Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-576

In The
Supreme Court of the United States
October Term, 1986

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT McCAULEY, PHILIP GROVE, and VINCENT BRACCIALE,

Petitioners,

v.

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing New Jersey Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward, and RICHARD W. LAWRENSON, Associate Steward,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

Petitioners', five journeyman jockeys, seek a writ of certiorari to review the constitutionality of the New Jersey Racing Commission's regulations authorizing pre-race breathalyzer and limited, random post-race urine tests for licensed jockeys riding in licensed horse-race meetings within the State of New Jersey. After a four-day trial the regulations were held to be constitutional by the United States District Court (Pa19-Pa60). Thereafter, the Third Circuit Court of Appeals again affirmed the constitutionality of the regulations. 795 *F.*2d 1136 (3d Cir. 1986) (Pa1-Pa18).

New Jersey Racing Commission regulation *N.J.A.C.* 13:70-14A.10 permits the use of breathalyzer tests for officials, jockeys, trainers and grooms and mandates that if any person receives a reading of .05 percent or more, then they shall not be permitted to undertake their assignments. Such a finding also exposes the person to a fine or suspension if the track officials so determine, and a second violation can lead to expulsion. As presently implemented, each jockey receives a breathalyzer test every night before racing. *N.J.A.C.* 13:70-14A.11 prohibits the use by jockeys of any Controlled Dangerous Substance (as defined by statute, in *N.J.S.A.* 24:21-1 *et seq.*) or any prescription legend drug, unless such drug was obtained pursuant to a valid prescription or order from a licensed physician. The regulation authorizes the use of a post-race urine test to determine the use of drugs by a jockey. The first time a jockey is found to have a positive urine test, he receives a written reprimand and is subject to mandatory testing. If a second positive result is obtained,

the jockey must enroll in a treatment program, but is permitted to continue riding unless participation is deemed detrimental to the best interests of racing. A third positive result subjects a jockey to a fine, suspension or expulsion. Pursuant to the regulation, the results of any urine test are kept confidential, except for use with regard to any hearing in connection with a violation of the regulation. As presently implemented, several jockeys are selected at random each evening for urine testing.

Bruce Garland, Deputy Director of the Racing Commission, testified that the regulations at issue were prepared after consultation with the New Jersey Department of Health, New Jersey State Police, horsemen's groups, jockeys' organizations and other groups and took eighteen months to develop and promulgate (Tr. Garland at 37-38). The harness drivers' organization had approached the Racing Commisison to set up similar regulations for their industry, and their comments with regard to the regulations have been "favorable" (Tr. Garland at 40-41).*

Garland testified that the primary purposes of the regulations were safety, protecting the integrity of racing, and the identification and rehabilitation of alcohol and drug abusers (Tr. Garland at 39). He pointed out that the integrity of racing is at issue because of the public's need to be certain that races are honestly run since there is wagering upon the races (Tr. Garland at 39-40). He stated that the public perception of the integrity of racing is undermined since drugs are purchased from people

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* Those regulations, which mirror the regulations with regard to jockeys, are *N.J.A.C.* 13:71-18.1 (breathalyzer) and 13:71-18.2 (urine testing).

connected with the criminal element and such a perception goes to the very foundation of the sport (Tr. Garland at 76). In response to the jockey's position that they can police themselves with regard to alcohol and drug abuse, it was his opinion that the public's perception of the integrity of racing would be enhanced by the Racing Commission, rather than the jockeys themselves, policing the industry (Tr. Garland at 77).

As currently implemented, all results of testing are kept confidential and not turned over to law enforcement authorities (Tr. Garland at 46). In fact, Garland testified that should the Racing Commission be required to supply information to law enforcement authorities, then the program would be discontinued (Tr. Garland at 46).

Between April 1, 1985 and June 1985, the testing program yielded five alcohol positives (four officials and one jockey) and one cocaine positive for a jockey (Tr. Garland at 57-58). Furthermore, in 1984, two jockeys were found in possession of cocaine at a racetrack (Tr. Garland at 84-85).

Samuel Boulmetis, the Chief Racing Commission official for thoroughbred racing and a former jockey, testified on behalf of defendants. Among his responsibilities is implementation of the alcohol and drug testing program at the thoroughbred racetracks (Tr. Boulmetis at 3-4). He was a jockey for nineteen years, a member of the Hall of Fame, president for six years of the Jockeys' Guild, the organization funding this lawsuit, and a racing official since 1967 (Tr. Boulmetis at 5).

He disputed the petitioners' contention that jockeys can police themselves and indicated that due to friendship,

individual jockeys would be reluctant to come forward with information (Tr. Boulmetis at 6-7). He testified that he has seen jockeys drunk or high in the jockeys' room and sometimes that person was permitted to ride (Tr. Boulmetis at 7-8). In his view the problem of alcohol and drug abuse among jockeys has increased since he was riding and has no reason to believe that jockeys would have a lower incidence of alcohol and drug abuse than the general population (Tr. Boulmetis at 7-9).

Boulmetis stated that racing requires a great deal of skill, mostly reflexes, and that even a slight decrease in reflexes would pose an increased danger in racing to both the jockey and other riders (Tr. Boulmetis at 9-10). In his experience there have been a number of serious accidents and deaths in races (Tr. Boulmetis at 9), and a substantial number of accidents could be caused by something other than an injury to a horse, such as carelessness on the part of the jockey (Tr. Boulmetis at 15).

He testified that he has implemented the testing program with flexibility, excusing jockeys who have been unable to provide urine samples (Tr. Boulmetis at 10-11). In his opinion the mandatory alcohol and drug testing program has helped the racing industry by building more confidence among the public and is not degrading to the jockeys (Tr. Boulmetis at 29).

Raymond Deputy, chief harness racing official for the state of Delaware, testified with regard to Delaware's drug testing program which he developed and implemented. That program was requested by the harness horsemen's organization and funded by them (Tr. Deputy at 32). The program uses mandatory random urine test-

ing similar to the New Jersey regulations and also requires each driver to pass a breathalyzer test (Tr. Deputy at 32). In his opinion, the random testing approach, as opposed to the probable cause system advocated by petitioners, acts as a deterrent, and that the probable cause approach would be insufficient by itself (Tr. Deputy at 36). Deputy stated that the testing program in Delaware has yielded five to six positives per year for alcohol and an average of 14.2% positives for drug use (Tr. Deputy at 34).

Dr. Robert Pandina, Scientific Director of the Center of Alcohol Studies and Associate Professor of Psychology at Rutgers University, testified as an expert witness on behalf of defendants. He was qualified as an expert in the development, implementation and evaluation of programs for both the identification and treatment of alcohol and drug abusers (Tr. Pandina at 3-4). In addition to his research and teaching responsibilities, Dr. Pandina serves as a consultant to the Commissioner of Major League Baseball (Tr. Pandina at 5).

It was Dr. Pandina's experience that ball players are reluctant to turn in another player with respect to alcohol and drug use (Tr. Pandina at 21). Thus, the self-policing approach advocated by petitioners could enable a drug user to continue undetected and thus not receive help or rehabilitation (Tr. Pandina at 21-22).

Dr. Pandina described the New Jersey testing program as the most effective approach and one which strikes a reasonable balance amongst the various considerations in drug testing (Tr. Pandina at 45). He concluded that the approach taken by the New Jersey Racing Commission

was conservative, more conscious of a person's rights, less invasive than other approaches which would provide more of a deterrent effect, and a "good" one (Tr. Pandina at 45-46).

Four jockeys testified on behalf of petitioners. They were all experienced, with a range of nine to eighteen years of riding. One of the jockeys testified that he had never observed anyone drunk or high in the jockey's room (Tr. McCauley at 66-67), two jockeys stated that they only saw three or four jockeys drunk or high (Tr. Grove at 82-83; Tr. Black at 109) and one jockey indicated that in fifteen years of riding he observed only five or six jockeys under the influence of alcohol or drugs prior to racing (Tr. Bracciale at 14-15).

Three of the four jockeys agreed that timing and reflexes were very important for a jockey (Tr. Bracciale at 34-35; Tr. Grove at 99; Tr. Black at 120). One jockey testified that any deterioration of reflexes could be hazardous on the racetrack (Tr. Black at 120-121), another indicated that any alcohol on the day of a race would affect a jockey's reflexes (Tr. Bracciale at 36-37), a third indicated that if a jockey was not in control of his senses he would be a danger on a racetrack (Tr. McCauley at 70), and the fourth jockey stated that he would be concerned if anyone rode in a race with his reflexes impaired in any fashion (Tr. Grove at 100). One of the jockeys also indicated that if a jockey was under the influence of alcohol or drugs or unfit to ride there would be "much chance of injury" (Tr. Bracciale at 14).

Each of the four jockeys agreed that riding a horse in a race posed substantial accident risks. Two jockeys stated

that horses travel approximately 40 miles per hour in a race (Tr. Bracciale at 35; Tr. Grove at 99), and three of the jockeys testified than an accident in a race involving one horse and jockey could cause a chain reaction where other horses and jockeys fall down (Tr. McCauley at 69-70; Tr. Grove at 100; Tr. Black at 121).

Regarding the administration of the testing program, one jockey stated that the breathalyzer test does not hurt at all and the urinalysis test does not involve any pain (Tr. Bracciale at 44). Another jockey testified that neither the urine nor the breathalyzer was a painful process (Tr. Black at 123).

Based on the testimony and evidence presented at trial, the District Court made 43 Findings of Fact. Among the more critical findings were:

1. The risk of serious injury in a race is "apparent" and is "greatly increased if a jockey participates while under the influence of alcohol or controlled dangerous substances." Finding of Fact No. 4.

2. The District Court took judicial notice of the fact that alcohol and drug abuse is a serious national problem, and the degree of risk is the same for athletes as the general public. Finding of Fact No. 5.

3. The New Jersey Legislature has enacted strict controls over horse racing and vested the Racing Commission with the broad powers necessary to supervise the industry. *See, e.g., N.J.S.A.* 5:5-30. Finding of Fact No. 11.

4. Oral and written notice of the adoption of the regulations at issue were provided to all persons affected and the Jockey's Guild. Finding of Fact No. 14.

5. The urine test results are kept confidential. Finding of Fact Nos. 27, 32 and 34. [Pa21-Pa31].

The District Court determined that the Racing Commission's drug testing program was constitutional. *Shoemaker v. Handel*, 619 *F. Supp.* 1089 (D.N.J. 1985).

In affirming, the Third Circuit Court of Appeal held, *inter alia*, that these tests are constitutional since they are administrative searches conducted pursuant to the regulation of a closely regulated industry. *Shoemaker v. Handel*, 795 *F.*2d 1136 (3rd Cir. 1986).

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ARGUMENT

POINT I

THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE NEW JERSEY RACING COMMISSION OVERSEES A HIGHLY REGULATED INDUSTRY WHICH JUSTIFIES THE ADMINISTRATIVE INSPECTION EXCEPTION FOR WARRANTLESS SEARCHES.

There can be no doubt that the New Jersey horse racing industry is highly regulated and that the state has a strong interest in the integrity of same. Such stringent regulation is essential because of the danger of clandestine and dishonest activity inherent in the business of horse racing. *Garifine v. Monmouth Park Jockey Club*, 29 *N.J.* 47, 148 *A.*2d 1 (1959); *State v. Dolce*, 165 *N.J. Super.* 488, 398 *A.*2d 610 (Law Div. 1979), *aff'd* 178 *N.J. Super.* 275, 428 *A.*2d 947 (App. Div. 1981); *Dare v. State*, 159 *N.J.*

Super. 533, 388 *A.*2d 984 (App. Div. 1978). As has been said by our courts, the horse racing industry itself and the legalized gambling which accompany its activities are strongly affected by a public interest. *Maietta v. New Jersey Racing Commission,* 183 *N.J. Super.* 397, 444 *A.*2d 55 (App. Div. 1982), *aff'd,* 93 *N.J.* 1, 459 *A.*2d 295 (1983); *Dare v. State, supra; State v. Garden State Racing Ass'n,* 136 *N.J.L.* 173, 54 *A.*2d 916 (E. & A. 1947). Corruption in horse racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. *Dare v. State, supra; Jersey Downs, Inc. v. Div. of N.J. Racing Comm'n,* 102 *N.J. Super.* 451, 246 *A.*2d 146 (App. Div. 1968).

It is well settled that in regulating such industries, warrantless searches are entirely appropriate. *Donovan v. Dewey,* 452 *U.S.* 594, 101 *S.Ct.* 2534, 69 *L.Ed.*2d 262, (1981) (coal mines); *United States v. Biswell,* 406 *U.S.* 311, 92 *S.Ct.* 1593, 32 *L.Ed.*2d 87 (1972) (sale of guns); *Colonnade Catering Corp. v. United States,* 397 *U.S.* 72, 90 *S.Ct.* 774, 25 *L.Ed.*2d 60 (1970) (liquor industry). It was on this basis that the Third Circuit Court of Appeals sustained the constitutionality of the Racing Commission's regulations.

As such, the challenged regulation is an appropriate and constitutional exercise of the Racing Commission's charge to be a vigilant watchdog for the public in the regulation of horse racing due to its susceptibility to clandestine activity.

POINT II

THE DECISION OF THE COURT OF APPEALS IS NOT CONTRARY TO ANY OF THIS COURT'S PRIOR RULINGS NOR IS IT INCONSISTENT WITH ANY RULINGS OF THE OTHER CIRCUITS.

In urging this Court to grant a writ of *certiorari*, petitioners contend that the result below is contrary to this Court's decisions in *New Jersey v. T.L.O.*, 469 *U.S.* 325, 105 *S.Ct.* 733, 83 *L.Ed.*2d 720 (1985) and *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391, 59 *L.Ed.*2d 660 (1979) and contrary to decisions of the Courts of Appeals for the Second and Eighth Circuits in *Security and Law Enforcement Employees v. Carey*, 737 *F.*2d 187 (2d Cir. 1984) and *Hunter v. Auger*, 672 *F.*2d 668 (8th Cir. 1982). This argument is without merit, and therefore, *certiorari* should not be granted.

Indeed, in the main case relied upon by petitioners, *New Jersey v. T.L.O.*, this Court *upheld* a search of a student's purse by a school official. Certainly, the case contains dicta that searches must generally be reasonable. However, the Racing Commission has never taken the position that all searches, of all persons, at any time, for any reason are constitutional. *New Jersey v. T.L.O.* is simply not on point regarding the issue of the propriety of limited drug testing for a few, certain individuals involved in a highly regulated and physically dangerous business.

Delaware v. Prouse is easily distinguishable from the case at bar. A patrolman, acting without standards, guidelines or procedures promulgated by either the state or municipality pulled over an automobile on a whim, 440

U.S. 650-651. Thereafter marijuana that was discovered was ordered suppressed by this Court. Contrast the *Delaware* facts with those at hand. The universe of people subject to search is smaller; there are standards, guidelines and procedures to be followed and there are rational bases for the test, *i.e.* safety of the participants in a horse race and the integrity of the horse racing industry. This factual situation is wholly dissimilar to a patrolman who had noticed no suspicious activity stopping a vehicle because "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." 440 *U.S.* 650-651.

Similarly, neither the *Security and Law Enforcement Employees* case nor the *Hunter* case offer any solace to petitioners. The cases are similar in that they involve strip searches including visual examination of the anal and genital area of the person being searched, these persons being prison guards (*Security*) and prison visitors (*Hunter*). These courts were particularly concerned with the extreme intrusion of such a search. As stated in the *Security* court:

> The Supreme Court in *Bell v. Wolfish*, a case that involved visual body-cavity searches of pretrial detainees, noted that "this practice instinctively gives us the most pause." 441 *U.S.* at 558, 99 *S.Ct.* at 1884. Further, Justice Marshall's dissent in *Bell* observed that the visual body-cavity searches "represent one of the most grievous offenses against personal dignity and common decency." *Id.* at 576-77, 99 *S.Ct.* at 1893. Justice Stevens, in his dissent, expressed the same view when he stated that visual body-cavity searches "— clearly the greatest personal indignity — may be the least justifiable measure of all." *Id.* at

> 594, 99 *S.Ct.* at 1903 (Brennan, J., joining). [737 *F.*2d 187].

The *Hunter* court held:

> Indeed, a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience [672 *F.*2d 674].

The petitioners cannot reasonably argue to the court that there is any true comparison, on an intrusiveness basis, between the Racing Commission's tests and a body-cavity search. In the case at bar, the District Court made the proper distinction.

> Likewise, the intrusiveness of the search must also be considered. While the Supreme Court has refrained from drawing bright lines among searches, breathalyzer tests and urinalysis are considered less intrusive than body cavity and strip searches. *See Schmerber,** supra; *United States v. Ramsey,* 431 *U.S.* 606, 618 n.1 (1976); *United States v. Des Jardins,* 747 *F.*2d 499, 504-05 (9th Cir. 1984). [Pa39].

Since the case at bar is not in conflict with previous decisions of this Court and the circuits, *certiorari* should be denied.

POINT III

CERTIORARI SHOULD BE DENIED SINCE THIS CASE DOES NOT RAISE A "SPECIAL AND IMPORTANT REASON" AS CONTEMPLATED BY RULE 17 OF THE SUPREME COURT.

Petitioners urge that the national problem of drug abuse warrants review of the case at bar (Pb27-30). How-

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* *Schmerber v. California,* 384 *U.S.* 757, 86 *S.Ct.* 1826, 16 *L.Ed.* 2d 908 (1966).

ever this is not a case of national importance. It does not involve drug testing of hundreds of thousands of persons such as military personnel, police officers, firemen, teachers or all federal employees (Pb27). To the contrary, this care involves few persons *i.e.*, only those persons who ride as jockeys in thoroughbred races in the State of New Jersey.

More importantly, the opinion of the Court of Appeals is extremely narrow, both in terms of tests allowed and individuals affected. As the Court said:

> Our holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry. Thus it should not be read as dispositive of the distinct issue presented in testing of children subject to mandatory school attendance laws or the testing of motor vehicle drivers. [Pa14, footnote 5].

The petition for writ of certiorari plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief.

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CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 31, 1986